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Supreme Court of the United States

OCTOBER TERM, 1962.

DOCKET NO. [redacted] 463

THOMAS I. FITZGERALD, Public Administrator of the County of New York, as Administrator of the goods, chattels and credits of Andres San Martin, deceased,

Petitioner,

against

UNITED STATES LINES COMPANY,

Respondent.

BRIEF OF RESPONDENT, UNITED STATES LINES COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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OPINION BELOW.

The opinion of the Court of Appeals is reported at 306 F. 2nd 461. The opinion and findings of fact and conclusions of law of the District Court are not reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 29, 1962.

It is not disputed that the jurisdiction of this Court is invoked by virtue of 28 U. S. C. Section 1254 (1) and 2101 (c). However, the petition fails to show sufficient reason to justify a review by this Court and that there exists any of the grounds for granting a writ as set forth in Rule 19 of the Revised Rules of this Court.

Questions Presented.

1. Was the original plaintiff entitled to a jury trial as of right with respect to his second cause of action for maintenance and cure on the basis that;

(a) There was an undisclosed and unasserted diversity of citizenship between the parties

(b) The second cause of action was joined with a cause of action which alleged a right to recover damages pursuant to the provision of 46 U. S. C. 688 (Jones Act)?

2. Was original plaintiff denied the right to submit to the jury, as part of his Jones Act suit, his claim for aggravation of injuries allegedly caused by defendants' failure to provide timely, adequate and competent medical care and attention, and maintenance and cure?

3. Was reversible error committed by the district judge in excluding certain evidence offered by the original plaintiff?

Statement.

Andres San Martin, a seaman who died during the pendency of the appeal to the Court of Appeals*, sued United States Lines Company, his employer, for injuries allegedly sustained aboard its vessel, the SS. *American Reporter*.

The complaint contained two causes of action. The first cause of action set forth two separate theories under which recovery was sought; (1) Negligence under the Jones Act, 46 U. S. C. 688; (2) Unseaworthiness under the General

* San Martin died on November 6, 1960. The Public Administrator was appointed Administrator of his estate on October 3, 1961 and was substituted as Plaintiff-Appellant in this case on October 10, 1961.

Maritime Law. As part of his Jones Act claim the original plaintiff also alleged defendant's failure to provide him with timely, adequate and competent medical care and attention and maintenance and cure, which resulted in an aggravation of his injuries. The second cause of action was to recover sums allegedly due for maintenance and cure, earned wages and wages to the end of the voyage.

There was no allegation of diversity of citizenship set forth in the complaint and it did not even allege the citizenship of the plaintiff.

At the outset of the trial and before the jury was selected, the District Judge, over the objection of San Martin's attorney, ruled that the second cause of action for maintenance and cure would be decided by him at the end of the presentation of all the evidence.

The action was tried before the Honorable Richard H. Levet and a jury and resulted in a jury verdict for the defendant on the first cause of action and an award by the Court, sitting without the jury of $224.00, plus interest, on the second cause of action for maintenance and cure. Judgment was entered on the 6th day of September, 1960.

Facts.

San Martin, age 62 at the time of trial, joined the SS. *American Reporter* in November, 1953 as a wiper. On November 5, 1954, while the vessel was tied up at the Brooklyn Army Terminal, San Martin claimed that he was injured while he and two other wipers were engaged in loading engine room stores aboard the vessel from the dock. The stores, in addition to other items, included four 100 pound metal drums of boiler cement and one 200 pound drum.

The order to bring the stores aboard was given by First Assistant Engineer Quellmalz to engine room utilityman

Manzo (38)* who in turn directed San Martin (111) and two other wipers, Murrell and Rosales, to perform the work.

San Martin complained to Manzo about bringing the drums aboard manually, but was told "you have to do it anyway" (860-861). The 200 pound drum was rolled up the gangway (168). San Martin, on separate occasions, carried two of the 100 pound drums aboard on his shoulder (34, 35, 39). Murrell, one of the other wipers, also carried one of the drums aboard (171). It was not shown how the fourth drum was brought aboard.

The gangway was supplied by the United States of America. It was either 42 or 45 feet long, with wooden handrails and rigged at an angle of approximately 25 degrees.

San Martin testified that while carrying the second 100 pound drum up the gangway, the drum and gangway moved and he moved from side to side and had to hold onto the rope handrail (39, 40, 65). The rope handrails were not very taut (64). As shown by United States of America's Exhibit C, the handrails were wooden and not rope. He experienced pain in his back and left leg at this time (40) and stopped but then continued up the gangway to the deck of the vessel with the drum (102, 103).

On the evening of November 7, 1954, the vessel sailed for London. During the crossing, San Martin's back continued to pain him. There was nothing in the vessel's medical log (Plaintiff's Exhibit 2) showing that San Martin reported his accident before the vessel sailed or during the crossing, although there is an entry on December 5, 1954, a month after the alleged accident, showing that he complained of "soreness in the muscles of right leg" which had originated the day before.

On the termination of the voyage in New York on or about December 15, 1954, San Martin was given a Master's

* References are to the stenographer's minutes.

Certificate for medical treatment at the United States Public Health Service Clinic at Hudson & Jay Streets in New York City. He received outpatient treatment there from December 20, 1954 to January 12, 1955. From January 12th to March 1st, 1955, he was an inpatient at the United States Public Health Service Hospital on Staten Island (Plaintiff's Exhibits 3 and 4). San Martin's condition was diagnosed as:

1. aneurysm of aorta due to arteriosclerosis;
2. herniation of nucleus pulposus due to unknown cause;
3. syphillis of undiagnosed site.

According to the Staten Island records, San Martin denied "trauma to back or legs" at the time of admission.

When discharged from the hospital, he was marked "Not fit for duty, indefinitely", and it was noted that he had received maximum hospital benefits (Plaintiff's Exhibits 3 and 4). The hospital records did not show that he had ever returned for treatment nor was there any proof offered to show this fact.

At the end of the case and before it was given to the jury, San Martin's attorney withdrew any claim based upon the nature of the gangway or the operation of the gangway or its position (864). Accordingly, United States Lines Company consented to a dismissal of its third party action against the United States of America.

Reasons for Denying the Writ.

It is well recognized that the power of this court to review is sparingly exercised and its jurisdiction can only be invoked when the the matter involved is of general importance to the public at large or there is a conflict in the

decisions of the Courts of Appeals of the circuits. As was pointed out by Justice Frankfurter in *Rogers* v. *Missouri Pacific RR Co.*, 352 U. S. 500, certiorari should only be granted to secure uniformity of decision between the Circuit Courts of Appeals or to bring up for review cases involving questions of importance which it is in the public interest to have decided by the Supreme Court. The jurisdiction of the court cannot be invoked merely to give the defeated party in the Circuit Court of Appeals another hearing.

Despite petitioner's assertion to the contrary there is no real conflict between the Circuit Courts of Appeals on the question of the right to a jury trial on a claim for maintenance and cure that is pendent to a Jones Act claim.

As to the other reasons asserted by the petitioner for granting certiorari, these clearly do not involve any conflict in the circuits and are not matters of substantial importance to be considered by this court. One of them deals merely with the question of the trial judge's discretion to exclude certain evidence and the other with whether the petitioner should have been given a jury trial on the basis of diversity when it was not alleged in the complaint and petitioner's attorney at no time in the lower court claimed the right to a jury trial on this basis.

The refusal of six of the Circuit Judges sitting in banc to allow the public administrator a trial by jury of the seaman's claim for maintenance and cure as a matter of constitutional or statutory right (in place of the trial before the judge who awarded the seaman appearing before him a sum which the entire court held not to be erroneous) simply to support the apparent hope of the administrator that he might fare better before a jury, does not, under the peculiar facts of this case, present a real question which a decision by this court would resolve.

While the discussion by the Court of Appeals below is of academic interest, the propriety of a jury trial of a maintenance and cure claim already had or directed, as a matter of policy or discretion or its binding or advisory effect, is not involved. What is involved is the assertion by a public administrator of an absolute right to a jury trial of a deceased seaman's maintenance and cure claim and the nullification of the clearly correct decision by the trial court who had the opportunity to judge his credibility in the courtroom.

Argument.

It is the petitioner's contention that the trial court, by withholding the maintenance and cure claim, i.e, the second cause of action, from the jury, violated the plaintiff's right to a jury trial. This contention is based on two theories: (1) that San Martin had invoked the court's diversity of citizenship jurisdiction; and (2) that the claim for maintenance and cure was pendent to his Jones Act claim which was triable of right to the jury.

Diversity.

It is well settled that when a maritime claim such as this is commenced in the federal court on the ground of diversity of citizenship, the parties are entitled to a jury trial. However, it is elementary that in order to invoke the diversity jurisdiction of the court the party must plead and prove diversity of citizenship or at least inform the parties and the court of the intention to rely on diversity. The petitioner failed to plead diversity of citizenship and did not indicate in any way in the district court that he was relying on it. The first time it was mentioned was in his brief on appeal to the Court of Appeals.

At the outset of the trial, the trial judge, over the objection of petitioner's attorney, ruled that the cause of action for maintenance and cure would not be submitted to the jury for determination but would be decided by him. When the trial judge first made his ruling petitioner's attorney merely objected without giving any reason (9) accordingly the trial judge adhered to his ruling (9).

On the following day, before the taking of any testimony, petitioner's attorney again objected to the Court's ruling on this matter and in support of his objection cited the case of *Jenkins* v. *Walker*, without giving any citation, although mentioning that it was a case in the District of Massachusetts, First Circuit. He also mentioned the fact that the *Jenkins* case had been discussed by the United States Supreme Court in *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354 (1959) (18, 19, 20). The *Jenkins* case referred to was obviously *Jenkins* v. *Roderick*, 156 F. Supp. 299 (D. Mass. 1957) which dealt with the question of whether a maintenance and cure cause of action was pendent to a Jones Act claim. Thus, the only reason given to the trial judge to have him change his ruling was that there was pendent jurisdiction in the instant case. Naturally, it was not pointed out that the pleadings showed diversity of citizenship and there was not even a suggestion that the petitioner's attorney intended to prove diversity of citizenship or was relying on it.

Even after San Martin had testified and had indicated, although by no means conclusively that he was a citizen of New York or Spain, his attorney never called this fact to the Court's attention and asked for a jury trial on the maintenance and cure cause of action on a diversity basis.

Accordingly, the lower court was clearly justified in its original ruling.

PENDENT JURISDICTION.

Petitioner's second theory is that, aside from diversity a jury trial on the maintenance and cure cause of action was required because it was "pendent" to the Jones Act cause of action.

Six of the judges of the Court of Appeals rejected petitioner's contention and held that he was not entitled as of right to a jury trial on this basis. Petitioner asserts that this decision is in direct conflict with the First Circuit in *Mitchell* v. *Trawler Racer, Inc.*, 265 F. 2nd 426 (1959) and for this reason certiorari should be granted.

As Judge Friendly indicated in the court below at p. 470 the issue is whether the deceased seaman had a right to a jury trial of his claim for maintenance and cure based upon the Seventh Amendment to the Constitution or a statute of the United States.

The only authority cited to the trial judge in support of the claim of the right to a jury trial was a decision of the District Court of Massachusetts sustaining the "propriety" of a jury trial on that basis, namely the decision of Judge Wyzanski in *Jenkins* v. *Roderick*, 156 F. Supp. 299, which followed Judge Magruder's dictum in his opinion in the case of *Doucette* v. *Vincent*, 194 F. 2nd 834, an opinion repudiated by this Court to a large extent in *Romero* v. *The International Terminal Operating Co.*, 358 U. S. 354. As Judge Wyzanski indicated, the question was not the *right* of a seaman to such a jury trial but the "propriety of allowing a jury trial".

The practice of the various circuits, including the Second Circuit, of allowing a jury trial of a claim for *unseaworthiness* joined with a Jones Act claim cannot justify the same procedure with respect to a claim for maintenance and cure and the strong reasons which sustain the one are

not applicable to the other. As this Court said in *McAllister v. Magnolia Petroleum Co.*, 357 U. S. 221, in holding that a short state statute of limitations should not bar an unseaworthiness claim joined with a Jones Act claim "if the seaman is to sue for both unseaworthiness and Jones Act negligence he must do so in a single proceeding" (as distinguished from a maintenance and cure claim), or risk a "bar" to a subsequent action for the same injuries, because these claims are but alternative grounds of recovery for "a single cause of action". A maintenance and cure claim is an entirely separate cause of action comprising elements unrelated to tortious conduct or proper and safe equipment and vessel.

There is no conflict between the Court of Appeals decision in the case at bar and *Mitchell* v. *Trawler Racer, Inc.*, *supra*. Clearly, the discussion of Judge Magruder in that case is dicta, since no error was claimed by any of the parties with respect to the allowance of a jury trial of a pendent maintenance and cure claim. In fact, he conceded that the parties did not have a "right" to a jury trial merely because a "pendent claim is joined with a claim under a Jones Act". His discussion simply suggested that in such a case a jury trial already had was not invalid or improper.

The discussion of Judge Magruder in *Mitchell* v. *Trawler Racer Inc.* of general principles does not present a conflict warranting certiorari. As stated in Stern and Gressman's Supreme Court Practice, Second Edition, page 110, a conflict "means that there must be a real conflict on the same matter of law or fact not merely an inconsistency in dicta or in the general principles utilized". In fact, the dissent in the case at bar admits that "Actual decision is scanty to the point of nonexistence".

Normally, the question of pendent jurisdiction arises when in its absence a District Court would not have any

jurisdiction of the pendent claim at all, but with respect to a maritime claim a district court always has "admiralty and maritime jurisdiction" under Article III of the Constitution, and no pendency is needed to confer power on the District Court to decide such a claim. Consequently, the only role that a "pendent" label might have, when attached to a general maritime claim joined with other claims, would be its use as a makeweight created to support a discretionary policy rather than an absolute right to a mode of trial. The dissent's "unitary" approach is another label designed to achieve the same result, but cannot confer the absolute "right" that the dissent advocates. The exercise of that discretion may not be rigid. It depends upon various fact patterns which cannot be resolved by reviewing this case, particularly when its application is made moot by the dismissal of the other claims.

Moreover, the "unitary form of approach" advocated by the dissent as requiring a jury trial as of "right", and not as a matter of discretion, on the basis of "practical convenience" is now academic as is the "pendent" approach, since the jury verdict has in fact extinguished the Jones Act and unseaworthiness claim (a result sustained by all of the Circuit Judges). A review of an asserted "pendent" or "unitary" right to a jury trial of the maintenance and cure claim unaccompanied by any other claim to which it can now be "pendent" or with which it can now be "unitary" would be mere formalism unsupported by "practical convenience" or any other "logical" consideration.

Finally, even if the law of Mitchell allowing the trial judge in his discretion to submit a maintenance and cure claim to the jury was applied here, a different result would not have followed. The trial judge even under Mitchell

could not have been held in error, absent an abuse of discretion. In reverse order, if the trial judge had granted a jury trial, under the law of Mitchell, there would be no basis for a reversal.

Thus, no matter what action was taken by the trial judge in the case at bar with reference to submitting the maintenance and cure claim to the jury, neither party could point to Mitchell to support a charge of reversible error. Accordingly the "pendent jurisdiction" question is academic and this Court should not be used as a forum to resolve it.

Petitioner Was Not Denied the Right to Submit to the Jury His Jones Act Claim for Aggravation of His Injuries.

It is the petitioner's contention that the Court, by withholding the maintenance and cure claim, i.e. the second cause of action, from the jury, precluded him from obtaining a jury determination of his Jones Act claim for damages arising from the defendant's alleged failure to provide proper medical care and maintenance and cure.

It is admitted in the petition that no evidence on this claim was offered by petitioner. He explains this omission by stating that he was merely following the Court's direction that it would hear testimony on the maintenance and cure claim (i.e. second cause of action) after the jury had rendered a verdict. It is quite obvious that the Court was referring only to testimony on the second cause of action and the petitioner was free to present his evidence to the jury on the Jones Act issue for failure to provide proper medical care and maintenance and cure.

The entire panel of the Court of Appeals *in banc* apparently concluded that the ruling of the trial court did not restrict the offering of evidence to the jury with respect to this part of petitioner's case.

THERE WAS NO REVERSIBLE ERROR COMMITTED BY THE TRIAL JUDGE IN EXCLUDING CERTAIN EVIDENCE OFFERED BY THE PETITIONER.

There is also no reason for reviewing the petitioner's contention, similarly rejected by the entire panel, that the district court erred in excluding certain conversations with fellow employees, when the trial judge had discretion to exclude those conversations for remoteness. This is obviously a question of evidence which does not call for review by the Court, although cleverly couched in the petition as a question involving a "proper jury trial".

This evidence question presents no unique and important question of federal law. Certainly, it would not appear to be the function of this court to review the minutia involved in general questions of evidence and to create by decision a model code of evidence for the trial courts or grist for the Wigmore mill.

CONCLUSION.

The petition fails to show that there is any question of importance which is in the public interest for this Court to decide or that there is lack of uniformity in the decisions of the Circuits as to warrant the granting of a writ of certiorari. The petitioner should not be permitted to use this Court as a forum for another hearing.

Respectfully submitted,

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